APPENDIX "A"

FACT STIPULATIONS AND FINDINGS OF FACT AT TRIAL OF CAUSE

1. In January of 1977, T. Smith contracted with the owners of the M/V Sei Shin to unload cargo from the vessel onto river barges.

2. To unload said vessel, T. Smith employed a longshore gang who were hired from the union hall and were paid on an hourly basis.

3. The derrick barge Patricia, owned and operated by T. Smith, is a navigable vessel, 200 feet in length, 56 feet in width and 11 foot depth, on which is mounted a traveling gantry crane. The vessel is designed for making heavy lifts. As used by T. Smith, the vast majority of its work is the loading and unloading of cargo to and from vessels, although on occasion it is used to make other lifts, e.g. ship's anchors, ship's machinery.

4. The derrick barge Patricia is crewed from a special pool of permanent employees of T. Smith, who are paid a fixed salary with overtime and vacation pay

and were not hired from the union hall. These crew members permanently worked only on derrick barges.

5. The crew of the Patricia are never intermingled and/or assigned to work in a longshore gang.

6. The duties of the crew of the Patricia were to maintain the vessel, paint and chip, tie up, cast off and to perform any duties necessary to carry out the function of the vessel.

7. On Febraury 1, 1977, T. Smith was engaged in performing its contract to discharge the M/V Sei Shin, then berthed at the Louisiana Avenue Wharf. Plaintiff, Martin Cavalier, was a member of T. Smith's longshore gang, which was working inside the hatches of the Sei Shin hooking up the drafts of cargo. The Patricia was lifting the drafts, once hooked up by the longshoremen, out of the ship and landing them in the river barges where the drafts were unhooked by other longshoremen. Work commenced at 6:00 p.m., and the accident occurred at approximately 3:00 a. m. on February 1, 1977.

8. At approximately 3:00 a. m., plaintiff's gang was working in the No. 1 hatch hooking up drafts of 30 foot pipe in slings attached to the fall of the derrick.

Anderson Nicholas, a member of the crew of the derrick, was standing over the No. 1 hatch, at the main deck of the Sei Shin, signaling Merlin Culver, the operator of the derrick crane who was also a member of the crew of the derrick, as he lifted the drafts of cargo out of the ship hold.

9. Through an error in judgment (negligence) of either the crane operator (Culver) or the flagman (Nicholas), the draft failed to clear the hatch coaming at the main deck, striking same and causing the pipes to slide out of the slings and fall into the hatch below, seriously injuring the plaintiff.

10. The plaintiff's injuries included an open comminuted fracture of his proximal left femur, multiple rib fractures, a fracture of his left inferior ischio-public ramus, a dislocation of the symphsis pubis and of the right sacro-iliac joint.

11. As a result of plaintiff's injury, T. Smith, through Employers National Insurance Company (its compensation insurer), has incurred medical expenses and paid compensation benefits to plaintiff under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

12. Plaintiff has brought suit against T. Smith under 905 (b) of Longshoremen's and Harbor Workers' Compensation Act for injuries sustained in the accident. The plaintiff alleges that T. Smith is liable under 905 (b) as owner of the vessel Patricia because of the neglience of the crew members. T. Smith defends alleging that plaintiff cannot recover because he was injured by employees providing stevedoring services.

Conclusions of Law

1. The specific issue before this court is whether the accident causing injury to plaintifff falls under the exclusion of 905 (b) that provides "if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel," so that the derrick barge Patricia and its owner, T. Smith and Son, are immune from a negligence action under 905(b).

2. The negligence of the Patricia is not disputed, nor is it disputed that the plaintiff is a person covered under the LHCA. Although the plaintiff was not providing stevedoring services to the Patricia, but, rather, the Sei Shin, the Patricia falls within the definition of

vessel in the LHCA because it was a vessel "upon which or in connection with which any person entitled to benefits under this chapter suffers injury...in the course of his employment,"33 U.S.C. 902 (21).

3. Although defendant, T. Smith and Son, is the employer of the plaintiff as well as the owner of the vessel, the Fifth Circuit held in Smith v. M/V Captain Fred, 546 F.2d 119 (C. A. 5th Cir., 1977), that a longshoreman may sue his employer qua vessel under 905(b). Therefore, absent the applicability of the exclusion set out in the second sentence of 905(b), the plaintiff could recover in a negligence action against T. Smith and Son.

4. In Captain Fred, the court interpreted the following report of the House Committee as indicating that they intended the Yaka rule to survive the 1972 amendments of the LHCA:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in Reed v. S. S. Yaka, 373 U. S. 410 (83 S. Ct. 1349, 10 L.Ed.2d 448) (1963) and Jackson v. Lykes Bros. Steamship Co., 386 U. S. 731 (87 S. Ct. 1419, 18 L. Ed.2d 488) (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. Accordingly,

the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are applicable to ship building or repair employees employed directly by the vessel. The Committee's intent is that the same vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons."

5. This passage has been analyzed by other courts as a guide to interpreting the meaning of the exclusions contained in 905(b). In Edmonds v. Compagnie Generale Transatlantique, 99 S. Ct. 2753, 443 U. S. 256, 61 L.ed 2d 521 (1979), the U. S. Supreme Court, in dicta, said that the legislative intent was to "treat the vessel that provides its own stevedoring services just like other shipowners when and if it negligently causes injury as a shipowner and just like other stevedores when it negligently injures in the course of providing its own loading and unloading services." The Supreme Court construed the second sentence of 905(b) "to permit a third party suit against the vessel providing its own loading and unloading services when negligence in its nonstevedoring capacity contributes to the injury."

6. The Second Circuit Court of Appeals had occasion to consider the exclusion in the second sentence of 905(b) in Smith v. Eastern Pile Driving, 604 F.2d 789 (1979). That court said that "the key issue is whether the shipowner's employees who were at fault committed the negligent acts in their capacity as agents of the

vessel on the one hand or as employees performing longshoring ...services on the other." The court found that in order for the exemption to apply, "the injured worker and the neglient employee must both have been performing the same function, whether it be longshoring, shipbuilding, repair work or...some other task."

7. The Fourth Circuit Court of Appeals, citing the Smith v. Eastern case, came to the same conclusion as the Second Circuit in regards the second sentence of 905(b). Richardson v. Norfolk Shipbuilding, 621 F.2d 633 (1980). The Richardson case is very similar, factually, to the case at bar. In that case, two employees of Norfolk were doing repair work on the U.S.S. Nashville and in order to do their work, they were suspended in a tray along the ship by means of a crane. The crane was operated by an employee of Norfolk and was positioned on a wooden barge owned by Norfolk. The men were injured by the fault of the crane operator. Plaintiffs argued that they should recover because they were not providing repair services ot the barge, but were part of the crew. The court rejected that argument and held that the accident occurred while the employees were acting in the capacity of repairmen and, therefore, could not recover because of the exclusion of 905(b).

8. In the instant case, plaintiff is a longshoreman who was hired by T. Smith and Son for the sole purpose of assisting in stevedoring services being provided to the Sei Shin. The plaintiff was injured by regular employees of T. Smith and Son who were crew members

of the stevedoring vessel and who were at that time assisting in the stevedoring operations.

9. The parties have stipulated that if either the crane operator or the flagman had been injured in the present accident, instead of plaintiff, and elected to sue T. Smith and Son under the Jones Act, he would be adjudged a seaman as a matter of law. They have also stipulated that if either the crane operator or flagman had been injured in the present accident, instead of plaintiff, and elected to sue T. Smith and Son for compensation benefits under the LHCA, he would be adjudged a non-seaman and entitled to benefits under the Act on the grounds that his primary duty was that of longshoreman.

10. The court recognizes these stipulations as part of the record, however, what legal status these employees may be entitled to has no bearing on whether the exclusion should apply to the accident involved. As demonstrated by the cases cited earlier, the proper inquiry is in what capacity was the crane operator or the flagman acting at the time the accident occurred. At the time of the injury, one tortfeasor was operating a crane to remove cargo from the Sei Shin's hold and the other was signaling the crane operator. There is no doubt that they were engaged in providing stevedoring services to the vessel at the time they negligently injured the plaintiff.

11. In the House Committee Report quoted earlier, Congress made it clear that all workers covered by the act should ave the same rights no matter who the owner of the vessel

was. By this, Congress intended that not only should an injured worker not be precluded from a negligence action against the vessel merely because it was owned by his employer, but also intended that a worker not be given any greater rights because his employer happened to be the vessel owner. The purpose of the exclusions was to prevent the latter from happening.

12. If the plaintiff were to be allowed to recover in this case, the consistency of treatment would be destroyed. A longshoreman injured, as the plaintiff was here, from the negligent operation of a floating crane would recover, but one injured through the negligent operation of a shore-based crane would not. Such a result would create a purely fortuitous distinction not intended by the drafters of 905(b).

13. Therefore, for the above reasons, the plaintiff is not entitled to a negligence action against T. Smith and Son because he was injured by employees providing stevedoring services.

ADDENDUM

Having concluded that the stipulated facts do not accord plaintiff a cause of action against T. Smith and Son under 905(b), yet taking into account that a reviewing court will have a completely equivalent ability to resolve this issue, I believe that judicial economy and the interest of justice are best served if I turn to a full consideration of plaintiff's damage claim.

Cavalier suffered severe and painful injuries

as a result of the accident on February 1, 1977. The steel pipes struck his left leg, knocking him down and among other pipes stowed in the hold of the ship and also caused injury to his head, ribs and hip. He sustained a scalp laceration, compound fracture of the left femur, multiple fractures of his ribs on the left side, separation of the symphysis pubis and fracture of the inferior part of the left pubis.

He was an inpatient at Touro Infirmary and later at Ochsner Foundation Hospital for a total of more than two months. When he was first admitted at Touro, surgery was performed and a traction pin wwas inserted into the proximal tebia. The operation wound was left open and the left leg was placed in traction for 17 days in order to allow drainage of the wound. The plaintiff was given a blood transfusion for excessive blood loss and had an indwelling catheter in place. He received IPPB treatments and blow bottle treatments to expand his lungs, which caused pain to his fractured ribs, in order to prevent pneumonia. He also wore an anti-embolism stocking on his right leg to prevent the formation of blood clots.

The plaintiff was transferred to Ochsner on February 17, 1977. On March 7, 1977, he had an open reduction and Schneider nailing of the left femoral fracture. The thigh and hip wounds were sutured and drainage tubing was inserted. He was discharged from Ochsner on April 16 on crutches and still wearing a TED hose to prevent blood clots.

Thereafter, he was seen by Dr. A. William Dunn on an out-patient basis at Ochsner through November of 1978. Dr. Dunn saw him on numerous occasions during this period for complaints of leg and back pain, and, on March 20, 1978, Dr. Dunn diagnosed traumatic chondromalacia of the patella resulting from injuries sustained.

On March 28, 1978, Cavalier was readmitted to Ochsner Foundation Hospital for the removal of the Schneider nail and for a left patellectomy. A cylinder cast was applied, and he was discharged from the hospital on crutches on April 3, 1978. He was then placed on physical therapy for whirlppol and knee exercises and in the latter partof May was walking with the aid of a cane.

Dr. Dunn reported that plaintiff had reached maximum recovery by late November, 1978. Although Cavlier still compalined of pain in his back and knee at that time, Dr. Dunn found that the plaintiff had no trouble with his left hip and thigh, had full motion of his left knee and a 20% loss of internal rotation range of his left hip. That physician concluded that plaintiff would not, thereafter, be physically able to return to work as a longshoreman. Dr. Dunn found him to be depressed as a result of the accident and resulting injuries and referred him to a psychiatrist, Dr. Richard Mestayer.

Plaintiff was treated by Dr. Mestayer for depression from late 1978 through December, 1979. When Dr. Mestayer first saw plaintiff, he reported that Cavalier was severely depressed and had suicidal feelings which were secondary

to the injury of February 1, 1977. He was hospitalized on November 30, 1978, for this depression and was discharged on December 24, 1978; however, the plaintiff continued to experience depression during 1979. As early as January, 1979, Dr. Mestayer had recommended that the plaintiff seek some sort of employment, but this was not affirmatively acted upon.

In November, 1979, the plaintiff consulted Dr. Essam Elmorshidy for back pain which he (Cavalier) felt was related to the injuries received in the accident. On Febraury 7, 1980, he was admitted to Methodist Hospital by Dr. Elmorshidy for evaluation of the chronic back pain and lumbar disc syndrome. He was treated with chemotherapy and pelvic traction and was discharged approximately a week later. Plaintiff was still being treated for back pain in August, 1980.

The plaintiff was seen by Dr. James Williams on August 20, 1980, approximately three weeks before trial. Dr. Williams found that Cavalier had some diastasis of the symphysis pubis and a 20% partial permanent disability of the left knee as a result of the patellectomy.

From all of the above, I am convinced that plaintiff has experienced significant, long-term pain and suffering and that he will continue to suffer some intermittant pain and will continue to experience physical disabilities which will effectively obviate his returning to heavy work similar to his pre-injury status as a longshoreman. Accordingly, I believe that had plaintiff prevailed, he would have been entitled to an award for past, present,

future pain, suffering and disability in the amount of $110,000.00.

Furthermore, I believe that Cavalier would have been entitled to certain medical expenses which have been incurred but not, as yet, paid in his behalf. The include:

Dr. Essam Elmorshidy	$ 306.00
Dr. Richard Mestayer	580.08
Methodist Hospital	1,574.65
Ochsner Foundation Hospital	999.99
	$3,460.72

Finally, had plaintiff prevailed, he would be entitled to loss of wages, which I will discuss in further detail as follows: I conclude that plaintiff's annualized average income prior to his injury was $13,500 per annum, or $1,125 per month. Having concluded that Cavalier was totally idsabled form the date of the accident until the end of 1978, I find that during that period he sustained a wage loss of $25,000. I further conclude, based upon the medical and related testimony, that Cavalier, though able to return to limited employment (which he did not choose to do) in 1979, would have (even if he had done so) incurred a wage loss of $8,000 and, likewise, in the first half of 1980, $4,000. Thus, I conclude that Cavalier has experienced an overall past wage loss of $37,000.

Though plaintiff has a college degree and was, in my view, able, at the time of trial, to return to gainful employment in various capacities, he has not seen fit to do so. He contends that inside desk work

makes him nervous and that, as a matter of fact, he sought employment as a longshoreman to get away from the kind of inside desk work that he still seeks to avoid. These contentions may be accurate, and, yet, it is obvious to me that Cavalier has both the physical and mental capacity to adequately perform in a substantial spectrum of job opportunities. Furthermore, it is clear to me from the evidence adduced at the time of trial that Cavalier has been operating a taxicab business for several months and, in the course of same, has either operated his own taxicab and/or operated other owned vehicles through the use of other personnel who pay a certain overriding figure to Cavalier for the use of those vehicles which Cavalier has obtained and converted to taxicabs.

Even so, it is apparent that Cavalier will not be able to return to work as a longshoreman and will, more likely than not, over his work life expectancy, experience a future wage loss which, through not susceptible to categoric determination, will be, in my estimation, on the order of $50,000.00.

Accordingly, had I reached a different conclusion with respect to liability, I would have awarded the following:

Past, present and future pain and suffering and permanent disability	$110,000.00
Medical and hospital expenses	$ 3,460.72
Past, present and future wage loss	$ 87,000.00
	$200,460.72

October 15, 1980.

Peter Beer
U. S. District Judge

APPENDIX "B"

JUDGMENT

The Court, noting that in rem process against the M/V SEI SHIN was never perfected and having heretofore dismissed, without prejudice, the complaint of Martin Cavalier against Daiko Senkyo; having heard the evidence on plaintiff's complaint against the several remaining defendants; and having rendered findings of fact and conclusions of law based thereon:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein dismissing, with prejudice, the complaint and supplemental and amended complaint and the second supplemental and amended complaint of Martin Cavalier against T. Smith & Son, Inc., Employers National Insurance Company and Arkwright-Boston Manufacturing Mutual Insurance Company, at complainant's costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein dismissing, with prejudice, the intervention of Employers National Insurance Company.

IT IS FURTHER ORDERED that the cross-claim of T. Smith & Son, Inc., individually, against Employers National Insurance Company,as its primary liability carrier and as its compensation carrier, and the third party complaint and amended third party complaint of T. Smith & Son, Inc. against Arkwright-Boston Manufacturing Mutual Insurance Company, as its excess liability carrier, be and they are hereby dismissed as moot.

New Orleans, Louisiana,this 9th day of December, 1980.

Peter Beer
United States District Judge

APPENDIX "C"

OPINION OF CIRCUIT COURT OF APPEALS

Martin CAVALIER, Plaintiff-Appellant

v.

T. SMITH AND SON, INC., et al.,
Defendants-Appellees

United States Court of Appeals, Fifth Circuit

Feb. 26, 1982

Longshoreman brought negligence action against vessel owner. The United States District Court for the Eastern District of Louisiana, at New Orleans, 499 F. Supp. 650, Peter Hill Beer, J., held that longshoreman's suit was barred, and longshoreman appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that longshoreman's action was barred, where injury was caused by negligence of person engaged in providing stevedoring services to vessel.

Affirmed.

1. Worker's Compensation

Longshoreman injured by negligence of crew of vessel may sue owner of vessel even though owner is also his employer, liable to him for compensation under Longshoremen's and Harbor Workers' Compensation Act., §§ 1-51,33 U.S.C.A. §§ 901-950.

2. Workers' Compensation

Longshoreman's action for negligence of vessel owner was barred, where injury was caused by negligence of persons engaged in providing stevedoring services to vessel. Longshoremen's and Harbor Workers' Compensation Act, § 5(b), 33 U. S. C. A §905(b).

Appeal from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

[1] A longshoreman injured by the negligence of the crew of a vessel may sue the owner of the vessel even though the owner is also his employer, liable to him for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C §§ 901-950(1976 & Supp. III 1979). Smith v. M/V Captain Fred, 546 F.2d 119, 122-23 (5th Cir. 1977). In this case the district court held that a longshoreman's suit is barred by the provisions of the LHWCA, however, if the negligence that caused the injury is attributable to members of the vessel's crew who are performing stevedoring services when the plaintiff is injured. This holding is based on an express provision of the LHWCA, and we, therefore, affirm.

The facts were stipulated. Because they are set forth at length in the district court's opinion, 499 F. Supp. 650 (E.D. La. 1980), we merely sketch them here. T. Smith & Son, Inc. ("T. Smith"), a general contract stevedore, contracted with the owners of the M/V Sei Shin to discharge cargo from that ship and to load the cargo into river barges. Martin Cavalier, a longshoreman employed by T. Smith, was a member of a gang of longshoremen working inside a lower hold

of the ship hooking up bundles of cargo. The cargo was to be removed from the ship by a crane mounted on the derrick barge Patricia, owned and operated by T. Smith, then lying alongside the ship. The flagman and the operator of the derrick crane, both of whom were members of the derrick crew, controlled the passage of cargo as it was lifted up through open hatches of the ship. The crane operator could not see the loads until they cleared the coaming of the hatch at the main deck of the ship, so the flagman was positioned on the main deck of the ship giving hand signals to the crane operator. Cavalier was injured when, solely through the negligence of either the crane operator or the flagman, a draft of pipes failed to clear the hatch coaming, causing the pipes to slip out of their sling and fall into the hold below, injuring Cavalier. T. Smith through its compensation insurer, paid Cavalier compensation benefits under the provisions of the LHWCA. Cavalier now seeks to recover from T. Smith for negligence in causing his injury.

[2] In Smith v. M/V Captain Fred, supra, we analyzed the applicability of 33 U.S.C. 905(b) when longshoremen working on a vessel owned by their employer are injured through the fault of members of the crew of the vessel. We have since applied its precepts when the crew members were not performing stevedoring work. Bossard v. Port Allen Marine Service, Inc., 624 F.2d 671 (5th Cir. 1980) (per curiam). However, the scope of Smith v. M/V Captain Fred is limited by the statute itself,[1] which provides that an action for "negligence of a vessel" cannot be

brought "if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." That proscription fits this case perfectly. The authority of Smith v. M/V Captain Fred stops at the statute's bar. This is the interpretation given the LHWCA by other Courts of Appeals. Richardson v. Norfolk Shipbuilding & Drydock Corp. 621 F.2d 633, 634-635 (4th Cir. 1980); Smith v. Eastern Seaboard Pile Driving, Inc., 604 F. 2d 789, 795 (2d Cir. 1979); Griffith v. Wheeling Pittsburgh Steel Corp. 521 F.2d 31,41(3d Cir. 1975), cert. denied, 423 U.S. 1054, 96 S. Ct. 785, 46 L.Ed.2d 643 (1976).[2]

We join these courts in following the clear language of the statute and we AFFIRM for these reasons and for the additional reasons set forth in the district court's clear opinion.

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1 Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services

to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(Emphasis added.)

. . . . . .

2 Accord, Mayfield v. Wall Shipyard, Inc., 510 F. Supp. 605, 608 (E.D.La. 1981).

ON REHEARING

BEFORE RUBIN, SAM D. JOHNSON and GARWOOD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

April 13, 1982

CERTIFICATE OF SERVICE

I, George J. Kambur, attorney for the Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on this____day of July, 1982, I did serve the requisite number of copies of the foregoing Petition for a Writ of Certiorari and Appendicies on all attorneys for the respondents by mailing said copies to them, postage prepaid and addressed as follows:

THOMAS W. THORNE, JR.
Lemle, Kellerher, Kohlmeyer & Matthews
21st Floor, Pan-American Life Center
601 Poydras St.
New Orleans, Louisiana, 70130
(Attorneys for T. Smith & Son, Inc. and Employers National Insurance Company, its liability insurer)

ROBERT M. CONTOIS, JR.
Jones Walter, Waechter, Poitevent Carrere & Denegre
225 Baronne St.
New Orleans, Louisiana
(Attorneys for Arkwright-Boston Manufacturers Mutual Insurance Company as excess liability insurer of T. Smith & Son, Inc.)

PATRICK E. O'KEEFE
Phelps Dunbar Marks Claverie, & Sims
1300 Hibernia Bank Building
New Orleans, Louisiana, 70112
(Attorneys for Employers National Insurance Company, Intervenor)

MAURICE C. HEBERT, JR.
Hebert, Abbott & Horack
666 Poydras Street - Suite 500
New Orleans, Louisiana, 70130
(Attorneys for T. Smith & Son, Inc., individually)

GEORGE J. KAMBUR
Attorney for Petitioner
207 G. J. Kambur Building

809 North Broad Street
New Orleans, Louisiana, 70119
(504) 488-2642